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No. 09-541

IN THE

Supreme Court of the United States

ROBERT B. JAFARI, POOPAK A. JAFARI AND MARK WITTMAN, POSTCONFIRMATION TRUSTEE, PETITIONERS

v.

WYNN LAS VEGAS, LLC AND DESERT PALACE INC. d/b/a CAESAR'S PALACE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY TO RESPONDENTS' STATEMENT

The casinos take pains to point out that, before his bankruptcy filing, Robert Jafari was a millionaire with extensive investment holdings, income, and personal property, "including a Mercedes, BMW, Range Rover, Rolls Royce, and lots of other 'toys.' " Br. in Opp. 4. Robert Jafari certainly fit the casinos' profile of a high roller. The casinos know their customers; Wynn Las Vegas knew what it was doing when it installed a Ferrari and Maserati dealership at its casino.[1]

A first-page article in the Wall Street Journal published two days after the casinos filed their opposition brief explains that high rollers are known in Las Vegas casino parlance as "whales." "The Gambler Who Blew $127 Million," The Wall Street Journal (Dec. 5, 2009), A1, at A18. The article's subject, Terrance Watanabe, lost $112 million over the course of a year at Caesar's Palace and its sister casino Rio. He is currently being prosecuted in Nevada state court for failure to repay an additional $14.7 million in "marker" debt. *Id.* Watanabe, the former owner of the Oriental Trading Company catalog firm, faces four felony counts for his nonpayment of the "markers."[2] He alleges that Caesar's Palace plied him with alcohol and unprescribed pain medication to get him to continue gambling. *Id.* His losses constituted 5.6% of Caesar's Palace's parent company's income in 2007. *Id.* at A1. As for its former

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[1] *See* "Wynn Las Vegas," available at http://en.wikipedia.org/wiki/Wynn_Las_Vegas (accessed on December 8, 2009).

[2] The article quotes Bernie Zadrowski, head of the Clark County District Attorney's Bad Check Unit, as saying that his office prosecutes roughly 200 "marker" debt cases every month.

good customer's allegations, the casinos' spokesman says that "Mr. Watanabe is a criminal defendant," and "[a]ll of his statements need to be seen in that light." *Id.* at A18. Watanabe is not among the "millions of persons who gamble at casinos – and enjoy it" (Br. in Opp. 1) -- at least not any more. Watanabe has received residential treatment, and no longer sets foot in casinos. "The Gambler Who Blew $127 Million," at A18.

Robert Jafari's vehicles and other nonexempt property are gone now, liquidated by the trustee for the benefit of his creditors, in accordance with the Bankruptcy Code and a Chapter 11 plan confirmed by a unanimous vote of Jafari's creditors. Jafari is not a millionaire any more.[3] This "whale" has been harpooned.

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[3] The parties' respective present or former financial resources are, of course, of no relevance to the issues before the Court. The tidbits the casinos offer up about Robert Jafari's former lifestyle and possessions appear to be submitted solely to prejudice the Court against him. That Robert Jafari became a millionaire, and later owned a Mercedes, BMW, Range Rover, Rolls Royce, etc., by doing what he did for the elderly and infirm as a nursing home entrepreneur, is as irrelevant to the issues before the Court as the fact that Steve Wynn became a billionaire (by one reckoning the 468th richest man in the world, with a net worth of $1.5 billion) by doing what he did unto the Robert Jafaris of the world. (Wynn is chairman, chief executive officer, and a principal stockholder of Wynn Resorts Limited, owner of Wynn Las Vegas, LLC. See "Steve Wynn (entrepreneur)," available at http://en.wikipedia.org/wiki/Steve_Wynn_(entrepreneur) (accessed on December 9, 2009).

I. **The casinos do not -- because they cannot -- dispute that this Court has twice deemed the first question presented worthy of review, and the lower federal courts are deeply and persistently split on this important and recurring issue. The casinos do not -- because they cannot -- dispute that the court of appeals was only able to avoid reaching that issue through the erroneous assertion that the petitioners conceded the applicability of Nevada substantive law if federal choice-of-law rules control. Under these circumstances, the court of appeals' failure to reach the question militates in favor of review, not against it.**

The only way the court of appeals succeeded in avoiding the important choice-of- law issue squarely pressed before it (and in both courts below it) was by asserting a nonexistent concession by petitioners: "Appellants do not dispute that if a federal choice-of-law analysis applies to this case, Nevada substantive law would apply and -- based on the bankruptcy court determination on remand -- the claims would be allowed." App. 8a. As we noted in our petition (at 11), "[t]he court of appeals simply made this up." The casinos have nothing to say in response. The manner in which the court of appeals avoided deciding the issue before it -- even after we pointed out the court's error in our petition for rehearing -- cries out for the exercise of this Court's supervisory power. This is an independent reason to grant review in a case already presenting an important unresolved federal question.

This Court ordinarily "will not review a question not pressed *or* passed on by the courts below." *Springfield v. Kibbe*, 480 U.S. 257, 266 (1987) (dissenting opinion of O'Connor, J.) (emphasis in the original). As the Court has noted, "this rule operates (as it is phrased) in the disjunctive," permitting review if the issue was either pressed in or passed upon by the lower courts. *United States v. Williams*, 504 U.S. 36, 40 (1992).

Petitioners *pressed* the same argument in the bankruptcy court and the district court as we did in the court of appeals: federal courts should apply forum state choice-of-law rules in bankruptcy and other federal question cases on issues as to which state law provides the rule of decision, unless a compelling federal interest dictates otherwise. We urged that this rule is dictated both by the Rules of Decision Act, 28 U.S.C. § 1652, and by this Court's recent cases stressing that the occasions for the creation of federal common law are "few and restricted." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994); *see also Atherton v. FDIC*, 519 U.S. 213, 218 (1997). The bankruptcy court *passed upon* the issue, and in a thoroughly reasoned opinion agreed. App. 39a - 44a.

The casinos urge a formulation different from the "neither pressed nor passed upon" rule. They contend that "this Court will ordinarily decline to address issues that were raised in the Court of Appeals but where the Court [of Appeals] did not decide the case on that specific issue." Br. in Opp. 8. They cite *Cooper Industries, Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-69 (2004), and *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001), in support. This

overstates what *Cooper* and *Adarand* actually said. In both cases the issue before the Court was one that had been neither briefed nor decided in *any* lower court. *Cooper*, 543 U.S. at 168-69; *Adarand*, 534 U.S. at 109. And all either case says is that this Court " 'ordinarily do[es] not decide in the first instance issues not decided below.' " *Cooper*, 543 U.S. at 169; *Adarand*, 534 U.S. at 109. Not "in the court of appeals," but "below."

And, of course, a reasoned opinion by the court of appeals addressing the issue raised by the petitioner is not a prerequisite to this Court's review. As Justice Scalia has noted, the Court "*may* review even a summary disposition," and it "sometimes review[s] judgments with no opinion." *Youngblood v. West Virginia*, 547 U.S. 867, 872 (2006) (opinion of Scalia, J., dissenting) (emphasis in the original).

Indeed, the failure of a court of appeals to address an issue it should have addressed militates in favor of this Court's review, as the Court's first decision of this term illustrates. In *Corcoran v. Levenhagen*, No. 08-10495, 558 U.S. ____ (U.S. Oct. 20, 2009), as here, the petitioner asked this Court to review a decision of the Seventh Circuit that did not address all the arguments the petitioner had advanced in the court of appeals. There, as here, the court of appeals overlooked some of the litigant's arguments -- and declined to address them even after the litigant pointed out the court's mistake in a petition for rehearing. This Court held that "the Seventh Circuit erred in disposing of Corcoran's other claims without explanation of any sort. The Seventh Circuit should have permitted the District Court to consider Corcoran's unresolved challenges to his death sentence on remand, or should

have itself explained why such consideration was unnecessary." *Id.*, slip op. at 2.

This Court's opinion in *Corcoran v. Levenhagen* was unanimous. It commanded the votes even of those Justices who do not ordinarily approve of orders granting certiorari, vacating, and remanding ("GVR orders") in the absence of an intervening change in the law or other relevant intervening event. *See Webster v. Cooper*, No. 08-10314, 558 U.S. _____ (U.S. Nov. 30, 2009), slip op. at 1-4 (dissenting opinion of Scalia, J.); *Youngblood v. West Virginia*, 547 U.S. 867, 870-75 (2006) (dissenting opinion of Scalia, J.); *Lawrence v. Chater*, 516 U.S. 163, 177-92 (1996) (dissenting opinion of Scalia, J., joined by Thomas, J.). *Corcoran v. Levenhagen* was an exercise of this Court's supervisory power. There is no suggestion in the Court's brief *per curiam* opinion that the issues independently merited certiorari review. There, as here, the Seventh Circuit's failure to decide issues it should have decided required correction. Here the substantive issues merit this Court's plenary review, rather than a GVR order.

The "neither pressed nor passed upon" standard has two purposes: to avoid review of issues that have been waived, and to ensure that the lower courts have had the opportunity to address important questions so that this Court may have the benefit of other judicial insights into the issue raised. The fundamental choice-of-law question presented here has been adequately ventilated in the lower federal courts. It is not an issue that would benefit from further "percolation." The issue has been percolating through the lower federal courts for over 68 years. Three generations of

percolation are enough. The pot is brewed. The issues this case raises are ripe for adjudication by this Court.

II. The Seventh Circuit's decision nullifies Wisconsin law. Under either potentially applicable standard, a "grouping of contacts" test for choice of law in contracts cases does not result in the enforcement of a foreign cause of action that is repugnant to the public policy of the forum.

As the casinos note, the Wisconsin courts use a "grouping of contacts" test for choice of law in contracts cases. Some Wisconsin cases have equated this "grouping of contacts" test with the approach taken by §§ 187 and 188 of the *Restatement (Second) of Conflicts of Law*. *Haines v. Mid-Century Ins. Co.*, 47 Wis. 2d 442, 446, 177 N.W.2d 328 (1970); *Utica Mut. Ins. Co. v. Klein & Son, Inc.*, 157 Wis. 2d 552, 556-57, 460 N.W.2d 763 (Ct. App. 1990). Other Wisconsin cases equate the "grouping of contacts" test with the application of the five-factor test set forth in *Heath v. Zellmer*, 35 Wis. 2d 578, 596, 151 N.W.2d 664 (1967). *Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc.*, 58 Wis. 2d 193, 202, 206 N.W.2d 414 (1973); *Employers Insurance of Wausau v. Certain Underwriters at Lloyds, London*, 202 Wis. 2d 673, 691, 552 N.W.2d 420 (Ct. App. 1996). Under either standard, a Wisconsin court will not enforce a contract that is repugnant to Wisconsin public policy.

Restatement (Second) § 187(2)(b) provides that parties cannot contract for choice of law at the expense of "a fundamental policy of a state which has a

materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of s. 188, would be the state of the applicable law in the absence of an effective choice of law by the parties." Comment *f* to *Restatement (Second)* § 187 clarifies that this rule is independent of and in addition to the gatekeeper provisions of *Restatement (Second)* § 90: ". . . To be 'fundamental' within the meaning of the present rule, a policy need not be as strong as would be required to justify the forum in refusing to entertain suit upon a foreign cause of action under the rule of s. 90."

Even if the Wisconsin courts have adopted the principles of the *Restatement (Second)* in contracts choice-of-law cases, this does not mean that a Wisconsin court will enforce contracts that are repugnant to Wisconsin policy, but have greater contacts with a foreign jurisdiction. For the *Restatement (Second)* principles include the public policy rule set forth in § 90: "No action will be maintained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum."

Suppose a Nevada brothel[4] contracted with a Nevada resident for her services as a prostitute for a term of years, in a contract made in Nevada, to be performed in Nevada, and by its terms governed by Nevada law. Later, thinking the better of her situation, the young woman moves to Three Lakes, Wisconsin, and breaches her contract. There is not a judge in the

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[4] Prostitution is legal in Nevada, by local option. *See* "Prostitution in Nevada," available at http://en.wikipedia.org/wiki/Prostitution_in_Nevada (accessed on December 8, 2009).

Badger State who would grant the brothel either specific performance or damages. And this is so whether Wisconsin's "grouping of contacts" test means the principles of the *Restatement (Second)*, or the five-factor test of *Heath v. Zellmer*.

The judicial enforcement of gambling debts is similarly repugnant to Wisconsin public policy, expressed in statute and case law. So strong is Wisconsin's public policy against gambling on credit that to accept a credit card as payment for a lottery ticket is a criminal offense, punishable by up to nine months in prison and a $10,000 fine. Wis. Stats. § 565.50(1).

The court of appeals, by eliminating public policy as a factor in the choice-of-law analysis, got Wisconsin law very wrong. The court of appeals' nullification of Wisconsin law; its invention of a nonexistent concession; and the importance of the underlying persistently unresolved federal question all militate in favor of a grant of certiorari. We ask this Court to grant certiorari, decide whether state or federal choice of law principles control where state law provides the rule of decision in a bankruptcy or other federal question case, and, if the Court adopts our answer to that question, certify the application of Wisconsin choice-of-law principles to the Wisconsin Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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